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Brief of Cotter for D. C.

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Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 229, Law Docket.

THE NEW ENGLAND RAILROAD COMPANY,
PLAINTIFF IN ERROR,

v.

ROBERT T. CONROY, *Administrator*,
DEFENDANT IN ERROR.

Brief for the Defendant in Error.

JAMES E. COTTER,
Counsel for Defendant in Error.

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Statement of the Case.

This was an action of tort, brought by an administrator of a brakeman named Gregory, to recover for his death, owing to alleged negligence of the plaintiff in error and its agents.

On December 15, 1894, a train of the defendant corporation, comprising fourteen cars, a locomotive, and tender, left Worcester, Mass., in the night time, heavily loaded with freight, bound for Providence, R.I., and with a conductor, engineer, fireman, and three brakemen, including the deceased.

"At a point in the State of Rhode Island, away from telegraphic communication and not at a station" the train broke

apart. The engineer, when he discovered this, gave signals to indicate that the train had separated, and ran on two and three quarters miles when he slowed up the engine preparatory to sending back to find the rear portion. The rear portion of the train was not stopped, and came down upon and collided with the engine, and car attached thereto, before escape was possible, thereby causing Gregory's death.

"The three brakemen on the train were a head, a middle, and a rear brakeman. Gregory was the head brakeman, and at once, on discovery of the separation of the train went to the top of the only car left with the engine. The conductor and the middle and rear brakemen had been riding in the caboose car at the rear end of the train, *and did not hear the warning signals* which the engineer gave with the whistle, nor know that the train had broken apart until the collision, but *remained all the time in the caboose.* The night was cold and clear. The accident was near midnight.

"The negligence complained of consisted in the alleged failure of *the conductor in control of the men and in charge of the train*, in view of the character of the night, the character of the road in respect to grades and curves, the speed at which the train was run, and *the liability of the train to part asunder at that place*, to *properly watch* and *supervise* its movements, and the fact that he, in *full knowledge* that the rear and middle brakemen were in the caboose, away from their brakes, *permitted them to remain* there, and failed to order them to the brakes.

"The jury were instructed: 'The conductor of the train, under the rules laid down by the rules of the Supreme Court of the United States, is in a peculiar and special condition. The conductor of the train, as I un-

derstand the theory of the rules of the Supreme Court of the United States, is, in a certain sense, between stations, at least, is in a certain sense like the master of a ship on a voyage; he is beyond the reach of orders, when running his train between stations; and therefore as a matter of *necessity*, as a matter of *public policy*, I suppose he must be held to stand in the place of the *corporation itself*, . . . If you find in this particular case, from the evidence in the case and such common knowledge as jurymen are entitled to use, that by the rules of this road, . . . *the conductor gave directions to the people who worked on the train, gave directions to start the train, gave directions to stop the train, gave directions as to the location and position of the different men on the train*, and also had the *general management* of the train and *control over it* when running *between stations*, then I say to you, gentlemen, that he for this case represents the company, and if injuries resulted from his negligent acts the company is responsible.'"

The jury returned a verdict for the plaintiff.

The Circuit Court of Appeals [redacted] certified the following questions of law for the decision of this court: —

1. Whether the negligence of the conductor was the negligence of a fellow servant of the deceased brakeman?

2. Whether the negligence of the conductor was the negligence of its vice or substituted principal or representative, for which the corporation is responsible?

Law.

The two questions certified present but one inquiry. "Whether the negligence of the conductor was that of a vice-principal?"

I.

The case of *Chicago R. Co.* v. *Ross*, 112 U.S. 377, decides that a conductor, under certain circumstances, is a vice-principal, and this court in later cases, in which attempts to question its authority have been made, has repeatedly asserted that there was an underlying principle in the Ross case applicable to the peculiar facts found in the case as to the authority and duties of a conductor of a railway train removed from the reach of the corporation, when he had absolute management and control, and there was no other personal representative of the master present to supervise the conduct of its business, and that such underlying principle had no application to certain later cases clearly distinguishable from the Ross case.

R.R. Co. v. *Baugh*, 149 U.S. 368.
R.R. Co. v. *Hambly*, 154 U.S. 349.
R.R. Co. v. *Peterson*, 162 U.S. 346.
R.R. Co. v. *Charless*, 162 U.S. 359.
Northern Pac. R.R. v. *Herbert*, 116 U.S. 642.
Oakes v. *Mase*, 165 U.S. 363.

R.R. Co. v. *Baugh*, *supra*, did not overrule the Ross case, as is contended by the plaintiff in error, but, on the contrary, expressly affirmed it. Mr. Justice Brewer, speaking for the court, said, —

> "The regulations of a company cannot make the conductor a fellow servant with his subordinates, *and thus*

overrule the law announced in the Ross case. Neither can it, by calling some one else a conductor, bring a case within the scope of the rule there laid down. In other words, the law is not shifted backwards and forwards by the mere regulations of the company, but applies generally, irrespectively of all such regulations. There is a principle underlying the decision in that case, and the question always is as to the applicability of that principle to the given state of facts."

The foregoing statement of the court has been understood as a direct affirmance of the Ross case.

See *R.R. Co.* v. *Beaton*, 64 Fed. Rep. 563, at 567, GILBERT, J.

In *Mason* v. *R.R. Co.*, 114 N.C. 718, AVERY, J,, said, —

"Upon a careful examination of the late authority . . . [*R.R. Co.* v. *Baugh*], we find that the Supreme Court of the United States has not modified or receded from the principle announced in *Railroad Co.* v. *Ross*, that a conductor in charge of a train is, as to those subject to his orders on the same train, a vice principal."

In the inferior federal courts, the principle of the Ross case has been applied to a master of a vessel, "while she is at sea beyond the reach and control of the owners, and the seaman is subject to the absolute control of the master, and cannot if he would leave the vessel and throw up his engagement".

Per GRAY, J., in "*A. Heaton*", 43 Fed. Rep. 592 at 595.

See "*The Titan*", 23 Fed. Rep. 413.
"*The Car Float*", 61 Fed. Rep. 364.

"*The Julia Fowler*", 49 Fed. Rep. 277.
"*The Frank & Willie*", 45 Fed. Rep. 494.

And where a conductor is in full control between stations, as in this case, the situation is analogous to that of a master of a vessel at sea; he is the one upon whom all the personal duties and powers of the master are *pro tem.* cast; his supremacy is complete, his crew has him alone to look to for that supervision which it is the master's personal duty to give; he has complete control over a most dangerous force; his subordinates have no opportunity, by any form of communication, to appeal to higher authority, and it is beyond their power to leave the service.

In *Borgman* v. *Omaha & St. L. R.R.*, 41 Fed. Rep. 667, O. P. Shiras, J., said, —

> "As I understand the principle to be recognized by the supreme court in the Ross case, it is that where a given operation connected with a railway requires care and oversight for proper performance thereof, and for that purpose there is placed in charge thereof one clothed with the duty of supervising and controlling the given work and having control and direction over those employed, . . . such person in carrying out the duty of control, supervision and management represents the company."

The Ross case has been approved or followed in many cases both in the federal and state courts.

Herbert v. *Northern Pac. R.R.*, 116 U.S. 642.
Canadian Pac. R.R. v. *Johnson*, 61 Fed. Rep. 738.
N.P. R.R. Co. v. *Beaton*, 64 Fed. Rep. 563.

"*The Car Float 16*", 61 Fed. Rep. 364.
Borgman v. *Omaha & St. L. R.R.*, 41 Fed. Rep. 667 (BREWER, J.).
"*The A. Heaton*", 43 Fed. Rep. 592 (GRAY, J.).
Howard v. *Denver &c. R.R.*, 26 Fed. Rep. 837 (BREWER, J.).
N.P. R.R. v. *Cavanagh*, 51 Fed. Rep. 517.
N.P. R.R. v. *Callaghan*, 56 Fed. Rep. 988.
Au v. *R.R. Co.*, 29 Fed. Rep. 72.
"*The Titan*", 23 Fed. Rep. 413.
Howard v. *Canal Co.*, 40 Fed. Rep. 195.
Central Trust Co. v. *R.R. Co.*, 34 Fed. Rep. 616.
R.R. Co. v. *Andrews*, 50 Fed. Rep. 728.
Mason v. *R.R. Co.*, 114 N.C. 718.
R.R. Co. v. *Moore*, 83 Ky. 675.
Boatwright v. *R.R. Co.*, 25 So. Car. 128.
Daniel v. *Chesapeake R.R. Co.*, 36 W. Va. 397.
Clark v. *Hughes*, 51 Neb. 780.
Wooden v. *Western R.R. Co.*, 43 N.Y. S.R. 218; (s.c.) 25 N.Y. Supp. 977.

The same principle was recognized in —

R.R. Co. v. *Fort*, 17 Wall. 553.
R.R. Co. v. *Stevens*, 20 Ohio, 415.
R.R. Co. v. *Keary*, 3 Ohio St. 201.
R.R. Co. v. *Collins*, 2 Duv. 114.

This court has held that the Ross case has no application to a case involving merely operations of a local crew under the superintendence of one of limited control, and who acts entirely under instructions from a superior. (*R.R. Co.* v.

Keegan, 160 U.S. 263; *R.R. Co.* v. *Peterson*, 162 U.S. 346; *R.R. Co.* v. *Charless*, 162 U.S. 359; *Alaska Mining Co.* v. *Whelan*, 168 U.S. 86.) Nor does it apply to a case of injury to a subordinate upon another train, or any other servant of the company over whom the negligent conductor has no control. (*Oakes* v. *Mase*, 165 U.S. 363; *R.R. Co.* v. *Hambly*, 154 U.S. 349.) As was said by Mr. Justice BROWN in *R.R. Co.* v. *Hambly*, *supra*, —

> "It may be observed that quite a different question was raised in that [Ross] case from the one involved here, in fact the liability was placed upon a ground which has no application to the case under consideration, viz., that the person sustaining the injury was under the direct authority and control of the person by whose negligence it was caused."

Nor does it apply to the case of one who, though having control of the power of locomotion, has only temporary authority over one who works with him. (*R.R. Co.* v. *Baugh*, 149 U.S. 368.)

But it has been confined by this and other courts to one having the peculiar powers and duties of a railway conductor, such as the conductor in this case was found to have (Certificate 2), or the master of a vessel at sea.

"It was decided on its own peculiar facts" (*R.R. Co.* v. *Charless*, 162 U.S. 359, at 363), and rests upon "a principle" peculiar to those facts (*R.R. Co.* v. *Baugh*, 149 U.S. 368), and "was intentionally limited to the case of a railway conductor" (per BREWER, J., in *Van Avery* v. *R.R. Co.*, 35 Fed. Rep. 40, at 41) of a certain dignity and situation (*R.R. Co.* v. *Peterson*, 162 U.S. 346); and when the master has no representative, if the conductor is not to be treated as

such personal representative (per FIELD, J., in Ross case, at page 395).

> "The reason underlying this is that by reason of the extent of the authority conferred, the power and discretion vested in such employee, the fact that practical supremacy and control are given him, it is fitting that he should be regarded as the active, present representative of the master, — one in whom the master has placed such confidence, and to whom he has so transferred his powers as to make him his other self."
>
> Per BREWER, J., in *Howard* v. *Denver &c. R.R.*, 26 Fed. Rep. 837.

The language of Mr. Justice BREWER in *Borgman* v. *Omaha & St. L. R.R.*, *supra*, is applicable to the case at bar:

> "Many of the elements which in the case of the conductor were noticed by the Supreme Court in the Ross case as reasons for holding him a vice principal and a controller of a department of service exist here, namely, entire control, separation from all other general officers, service requiring skill and ability and attended with danger, and many employees under him doing different kinds of work tending to accomplish one service."

The principle of the Ross case is supported by public policy and is recognized by subsequent legislation holding railroad corporations responsible to their servants for all injuries caused by the negligence of those having charge or control of trains, locomotives, switches, and signals.

> 7 Am. & Eng. Ency. Law (1st ed.) p. 858, note 1.

43 & 44 Vict. c. 42.
Ala. Code of 1886, secs. 2590, 2591, 2592.
Mass. Acts of 1887, c. 270.
Col. Sess. Laws, 1893, c. 77.
Ind. Acts 1893, c. 130.

II.

It is the personal duty of the master or employer of labor to provide for the safety of his servant, so that no danger shall ensue to him either by the want of a sufficient number of competent colaborers, or by exposing him to a peril known to the master or his representative, and unknown to the servant.

Northern Pac. R.R. v. *Herbert*, 116 U.S. 642, and cases cited.
Flike v. *B. & A. R.R.*, 53 N.Y. 549.
Booth v. *B. & A. R.R.*, 73 N.Y. 38.
Mason v. *Edison Co.*, 28 Fed. Rep. 228.
Mann v. *Delaware Canal Co.*, 91 N.Y. 495.
Heinser v. *Heuvelman*, 45 N.Y. Super. 88.
Coombs v. *New Bedford Cordage Co.*, 102 Mass. 572.
Wheeler v. *Wason Mfg. Co.*, 135 Mass. 294.
Perry v. *Marsh*, 25 Ala. 659.
Nall v. *R.R. Co.*, 129 Ind. 260.
R.R. Co. v. *May*, 108 Ill. 288.
Luebks v. *R.R. Co.*, 59 Wis. 127.
Stephens v. *R.R. Co.*, 86 Mo. 221.
Kelly v. *Cable Co.*, 7 Mont. 70.
Ice Co. v. *Sherlock*, 55 N.W. 294.
R.R. Co. v. *Holt*, 29 Kan. 149.
Baxter v. *Roberts*, 44 Cal. 187.

Neilon v. *Marinette Co.*, 75 Wis. 579.
Cullen v. *Norton*, 52 Hun, 9.
R.R. Co. v. *Blank*, 24 Ill. App. 438.
Spelman v. *Fisher Iron Co.*, 56 Barb. 151.
Laskey v. *R.R. Co.*, 83 Me. 461.
Harrison v. *R.R. Co.*, 79 Mich. 409.
R.R. Co. v. *Smith*, 76 Tex. 611.
Augusta Factory v. *Hill*, 83 Ga. 709.

"It is the duty of the employer to select and retain servants who are fitted and competent for the service; and to furnish sufficient and safe materials, machinery or other means by which it is to be performed, and to keep them in repair and order. This duty he cannot delegate to a servant so as to exempt himself from liability for injuries caused to another servant by its omission. Indeed, no duty required of him for the safety and protection of his servants can be transferred so as to exempt himself from such liability. The servant does not undertake to incur the risks arising from the want of *sufficient and skilful colaborers or from defective machinery or other instruments with which he is to work. His contract implies that in regard to these matters his employer will make adequate provision that no danger shall ensue to him.*"

FIELD, J., in *Northern Pac. R.R.* v. *Herbert*, 116 U.S. 642, and cases cited.

In *Rogers* v. *Ludlow Mfg. Co.*, 144 Mass. 198, it was said by FIELD, J., that, —

"If a master who takes no personal part in the management of his business has any duty to perform toward his servants, it is difficult to say that it is always wholly

performed by doing two things, by employing competent servants, and by furnishing ample means. In order that the business may be properly managed the servants should not only be competent but they should be *numerous enough to do*, and they should have the means of doing, whatever ought reasonably to be done. . . . The duty of a master . . . must be to use reasonable care in the management, and that is to exercise, or have exercised, a *reasonable supervision* over the conduct of his servants, as well as to use reasonable care in seeing that his servants are competent, and are furnished with suitable means for carrying on the business."

And in *Daley* v. *B. & A. R.R.*, 147 Mass. 101, at 114, DEVENS, J., said, in speaking of the duty of a master, —

"The servant charged with providing these appliances stands in the place of the master, and performs the duty incumbent on him. It is not sufficient that he is an intelligent and competent servant; if he neglects this the master is still responsible, unless he shall himself have exercised a reasonable care and supervision over him in seeing that the machinery was in proper condition. Nor is it enough that the master has employed suitable servants and furnished them with suitable materials, and instructed them to keep the machinery in repair. He must see that such servants do their duty."

So, in *Babcock* v. *O.C. R.R.*, 150 Mass. 467, at 472, KNOWLTON, J., said, —

"It is well settled that one who is in some things a mere servant may be made the master's agent to perform duties which are primarily personal to the master. *Moynihan* v. *Hills Co.*, 146 Mass. 586, and cases

cited. If in the present case the section master was intrusted by the defendant with the performance of the duty, or a part of the duty, of supervision of the tracks which a reasonable regard for the safety of its employees required the corporation to perform, the defendant is liable for his negligence in the performance of it."

See also —

Hough v. *R.R. Co.*, 100 U.S. 213.
Flike v. *B. & A. R.R.*, 53 N.Y. 549.
Booth v. *B. & A. R.R.*, 73 N.Y. 38.
Corcoran v. *Holbrook*, 59 N.Y. 517.
Fuller v. *Jewett*, 80 N.Y. 46.
Ford v. *Fitchburg R.R.*, 110 Mass. 241.
Shanny v. *Androscoggin Mills*, 66 Me. 420.

Thus, if a foreman, instead of taking from his gang one of undoubted skill, sends another of doubtful competency to perform a specific task upon the complete performance of which the safety of the other workmen may depend, the foreman's negligence is that of a vice-principal.

Mann v. *Delaware Canal Co.*, 91 N.Y. 495.

So, where a foreman withdrew from some work a part of the gang engaged thereon, and thereby negligently imperilled the safety of those left to complete the work, and an injury happened in consequence of such withdrawal, it was held that in the negligent exercise of his prerogative of withdrawing the men he was acting as a vice-principal.

Mason v. *Edison Co.*, 28 Fed. Rep. 228.

And where a conductor started on his trip with an insufficient crew, and an injury happened to a servant of the

company in consequence, it was held that the negligence of the conductor in attempting to conduct the operations of that train with an insufficient crew was personal negligence of the corporation.

Flike v. *B. & A. R.R.*, 53 N.Y. 549.
Booth v. *B. & A. R.R.*, 73 N.Y. 38.

It was the duty of the plaintiff in error, by its representative, to keep a sufficient force of competent men at their post of duty to properly control the train, and the true rule —

> " . . . is to hold the corporation liable for negligence . . . in respect to such duties as it is required to perform, without regard to the rank or title of the agent entrusted with their performance. . . . The same duty rested upon the company though every man employed had died or run away during the night, and if negligent in discharging it . . . whether in employing improper help or not enough of it, or *in not requiring their presence on the train*, it is upon every just principle responsible for the consequences ".
>
> *Flike* v. *B. & A. R.R.*, 53 N.Y. 549, cited with approval by *Northern Pac. R.R.* v. *Herbert*, 116 U.S. 642.

> "No matter whose immediate negligence it was to start the train without sufficient brakemen it was in law the negligence of the defendant for which it is responsible to persons sustaining injury therefrom, whether servants or third persons."
>
> *Booth* v. *B. & A. R.R.*, 73 N.Y. 38.

In the case at bar it was as much an act of vice-principalship for the conductor to suffer the rear and middle brakemen to absent themselves from actual service on the train when their presence at work was essential to the safety of the deceased, as it was in the two cases last cited for the conductor not to require the presence on the train of three instead of only two brakemen. In each case the omission was a non-performance of the master's duty.

And, by a parity of reasoning, it was as much an act of vice-principalship for the conductor knowingly to permit the withdrawal of two of the three brakemen from service when the concert of all was essential to a safe operation of the train as it was in *Mason* v. *Edison Co.*, *ubi supra*, for the foreman to withdraw some of the gang whose entire service was essential to the safety of those who were left.

The principle of these cases is that it is the master's personal duty, when requiring service to be performed, to depute *and keep* at work a number of men sufficient to reasonably secure the safety of all who are required by his authority to engage in it; and any person to whom he intrusts the power and duty of keeping them at work stands in his place, and his negligence in that respect is the master's negligence.

Northern Pac. R.R. v. *Herbert*, 116 U.S. 642.
Flike v. *B. & A. R.R.*, *ubi supra*.
Booth v. *B. & A. R.R.*, *ubi supra*.
Mason v. *Edison Co.*, 28 Fed. Rep. 228.

The act of the conductor in putting and keeping the deceased at work in a place of unusual danger, known to the conductor to be so, and not so known to the deceased, was the act of a vice-principal.

R.R. Co. v. *Fort*, 17 Wall. 553.
Coombs v. *New Bedford Cordage Co.*, 102 Mass. 572.
Wheeler v. *Wason Mfg. Co.*, 135 Mass. 294.
Perry v. *Marsh*, 25 Ala. 659.
Nall v. *R.R.*, 129 Ind. 260.
R.R. Co. v. *May*, 108 Ill. 288.
R.R. Co. v. *Blank*, 24 Ill. App. 438.
R.R. Co. v. *Holt*, 29 Kan. 149.
Luebks v. *R.R. Co.*, 59 Wis. 127.
Baxter v. *Roberts*, 44 Cal. 187.
Neilon v. *Marinette Co.*, 75 Wis. 579.
Laskey v. *R.R. Co.*, 83 Me. 461.
Harrison v. *R.R. Co.*, 79 Mich. 409.
Stephens v. *R.R. Co.*, 86 Mo. 221.
Kelly v. *Cable Co.*, 7 Mont. 70.
R.R. Co. v. *Smith*, 76 Tex. 611.
Augusta Factory v. *Hill*, 83 Ga. 709.

Thus in *R.R. Co.* v. *Fort*, 17 Wall, 553, a foreman ordered a boy under his charge to work in a dangerous place, and this court, through DAVIS, J., said, —

> "For the consequences of this hasty action the Company are liable, either upon the maxim *Respondent superior*, or upon the obligations, arising out of the contract of service. The order of Collett (the foreman) was their order. They cannot escape responsibility on the plea that he should not have given it. Having intrusted to him the care and management of the machinery, and in so doing made it his rightful duty to adjust it when displaced, and having placed the boy under him with directions to obey him, they must pay the penalty for the tortious act he committed in the

course of his employment. If they are not insurers of the lives and limbs of their employees, they do impliedly engage that they will not expose them to the hazard of losing their lives, or suffering great bodily harm, when it is neither reasonable nor necessary to do so."

And where a car cleaner was ordered under a particular locomotive without being informed that it sometimes for peculiar reasons started without warning, it was held that the act of the foreman in so placing the plaintiff at work was the act and negligence of a vice-principal.

R.R. Co. v. *Holt*, 29 Kan. 149.

The cases cited under this head do not rest upon the Ross case or its principle, but were supported exclusively on the theory of a breach of a personal duty which could not be delegated so as to exempt the master from liability. It is therefore contended that, irrespective of the Ross case, or the reasoning upon which it is based, this conductor was a vice-principal to whom was delegated the master's personal duty, —

1. Of assigning and keeping employed on the work to which the deceased was assigned a sufficient number of competent fellow workmen to perform the task in safety.

2. To refrain from exposing the deceased to unnecessary and unusual perils of which he had no knowledge.

The conductor in the case at bar was found by a jury to have been negligent in the performance of these duties, and for such negligence the plaintiff in error is liable.

JAMES E. COTTER,
Counsel for Defendant in Error.